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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HILARIO AGUIRRE,

Defendant and Appellant.

D048104

(Super. Ct. No. SCS192264)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

A jury convicted Hilario Aguirre of two counts of committing a lewd act upon a child (counts 2 and 3) in violation of Penal Code<sup>1</sup> section 288, subdivision (a). The jury also found true the allegations charged with both counts that in committing these acts Aguirre (1) used matter depicting sexual conduct under section 1203.066, subdivision (a)(9); and (2) had substantial sexual conduct with a child under 14 years old under

section 1203.066, subdivision (a)(8). The court sentenced Aguirre to a total of eight years in prison. He received consecutive sentences for the midterm of six years for count 2 and one-third the midterm, two years, for count 3.

Aguirre appeals, contending the court abused its discretion by (1) excluding credibility evidence that was highly probative of his defense and was neither cumulative nor confusing of the issues presented to the jury; and (2) failing sua sponte to instruct the jury of a lesser-included offense that was supported by the evidence. We affirm.

### FACTUAL BACKGROUND

#### *A. The People's Case*

The victim, who was eight years old, testified she would visit Aguirre, her father, at the home of Jessenia Benavides, Aguirre's girlfriend. She stated that while she and Aguirre were alone in Benavides's bedroom, Aguirre, who was naked, took off her clothes and touched her in a way she did not like. She testified that while on the bed, Aguirre touched his penis to her buttocks and that it hurt and felt bad. She also testified that Aguirre touched her vagina with his hands and that it was a touch that "took a little while."

At the time Aguirre touched the victim, pornographic anime movies were on the television. The victim stated that although she did not like those movies and never put them on, she often watched them in the bedroom with Aguirre. On a separate occasion, Aguirre, who was naked, removed the victim's clothes and touched his penis to her

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

buttocks while on the bed. The victim stated she never spoke with Benavides about what happened between her and Aguirre.

The victim denied having (1) problems with vaginal itching and (2) conversations with Aguirre about the proper way to clean herself after using the toilet. The victim also denied having heard Aguirre tell her not to watch the pornographic anime movies because they were for grownups.

Benavides testified that in September 2004 she opened her bedroom door and found the victim lying on a blanket on the bed with her chest and head on Aguirre's chest. Aguirre was under the blanket and, when Benavides removed the blanket, she saw that Aguirre's penis was exposed through the zipper of his pants. Aguirre told Benavides that he was "playing with himself," but later denied that that was what he was doing. In December 2004 the victim showed Benavides that Aguirre had "porno" movies in the bedroom and said that she watched them with Aguirre. Benavides then contacted the victim's mother and repeated the substance of her conversation with the victim and told her about the September 2004 incident on the bed that she witnessed.

After speaking with Benavides on the phone, the victim's mother thought that Benavides was lying, but she still called child protective services (CPS). The victim told a social worker that no one had tried to touch her vaginal area or her chest and that Aguirre watched "bad movies with naked people." The victim then mentioned something about Aguirre lowering something before she began to sob uncontrollably. The police and CPS agents spoke with both Aguirre and Benavides. The police received as evidence three pornographic anime DVD's from Benavides. The victim's mother testified that the

victim's behavior changed whenever she came back from visiting Aguirre and that she was often angry or crying.

Benavides was involved with Aguirre for more than three years. Benavides and Aguirre frequently fought and would be temporarily separated during this time. Sometime in 2003 Aguirre was arrested in Florida for hitting her. When defense counsel showed Benavides an undated letter (the hate letter), she testified she wrote it in June 2003 after she learned that Aguirre had cheated on her.

In August 2004 Benavides reestablished her relationship with Aguirre. Both Benavides and Aguirre testified that between August and December 2004, their relationship went well. The couple separated permanently after Benavides waved a knife at Aguirre and Benavides was criminally charged with that incident. Benavides lost her job as a result of that incident but has since gained new employment. Benavides testified that she does not hold a grudge against Aguirre for her arrest.

#### *B. The Defense Case*

Aguirre stated that the victim informed him on more than a few occasions, maybe four or five times, that her "pee-pee" hurt, and when he examined her he found feces in her vaginal area. He stated that he would put on latex gloves, clean her with baby wipes while she lay on the bed and apply diaper rash solution to the inflamed area. He stated that he informed the victim's mother of the victim's problem with cleaning herself properly.

As to the September 2004 incident, Aguirre stated he was taking a nap and the victim was lying next to him watching cartoons. Aguirre denied that his penis was

exposed. He believed the victim was upset with him in late 2004 because he broke a promise he made to her when he went back to long-haul truck driving.

Aguirre admitted to owning the pornographic anime DVD's. He denied showing them to the victim and instead stated that when he once caught her watching one of the DVD's, which he had accidentally left in the DVD player, he immediately took it out of the player and placed it back where he kept the adult DVD's. He denied ever inappropriately touching his hand or his penis to the victim's buttocks or vaginal area.

Aguirre testified that his relationship with Benavides was "stormy." He stated he found the hate letter, which was written in Benavides's handwriting, in his suitcase in June 2004; however, he admitted that the letter was undated. In August 2004 he reconciled with Benavides and moved into her home. Between December 2004 and March 2005 his relationship with Benavides worsened because Aguirre was unemployed. The couple separated after the knife incident in March 2005.

## DISCUSSION

### *A. Exclusion of Credibility Evidence*

Aguirre first contends the court prejudicially erred by excluding the hate letter because it was highly probative evidence of Benavides's bias against him. We reject this contention.

#### *1. Background*

The hate letter expressed Benavides's anger towards Aguirre and contained a statement—translated from Spanish to English—to the effect that Benavides hoped to be in a position one day where she is happy and Aguirre is suffering. The People objected to

the admission of the hate letter on relevance grounds. It was their position that, as the couple's relationship was going well at the time Benavides first spoke to the police about the September and December incidents, the fact that she had previously expressed anger towards Aguirre was not relevant. Furthermore, the evidence was cumulative because both Aguirre and Benavides testified that the letter expressed hatred towards Aguirre and that the couple's relationship was often tumultuous. Also, the letter would confuse the issues before the jury as it was undated and there was conflicting evidence regarding when it was written.

The defense countered that the evidence was offered to attack Benavides's credibility as it showed the "depth of feeling" that her relationship with Aguirre could arouse and that Benavides was capable of not stating the truth about Aguirre. Thus, they believed the evidence was admissible under Evidence Code section 780.<sup>2</sup>

The court found that the letter was inadmissible under Evidence Code section 352 as it (1) was cumulative of other evidence, specifically that their relationship was tumultuous and that Benavides has, in the past, been very angry at Aguirre; and (2) would confuse the issues because the letter was undated and therefore its probative value as to

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<sup>2</sup> Evidence Code section 780 provides in part: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including . . . [¶]. . . [¶] (f) The existence or nonexistence of a bias, interest, or other motive."

bias was somewhat unclear. The court also found that the letter could not properly be admitted under Evidence Code section 1101, subdivision (b).<sup>3</sup>

During jury deliberations, the jury requested: (1) to review the stipulation given by the social worker; (2) to see the hate letter; (3) to have parts of the victim's testimony read back to them; and (4) to have a clarification regarding the time frame of the charge for which they did not convict Aguirre. The jury deliberations lasted a day and a half.

## *2. Applicable legal principles*

We review rulings made by the trial court on evidence admissibility under an abuse of discretion standard. (See *People v. Waidla* (2000) 22 Cal.4th 690, 723.) Thus, such rulings "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Under Evidence Code section 352, "a trial court has broad discretion to exclude evidence it deems irrelevant, cumulative, or unduly prejudicial or time-consuming."

(*People v. Pride* (1992) 3 Cal.4th 195, 235.)<sup>4</sup> However, unless these dangers

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<sup>3</sup> As Aguirre states in his brief that Evidence Code section 1101 "was not really an issue," we need not address whether the evidence should have been admitted under this section.

<sup>4</sup> Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

substantially outweigh the probative value of relevant evidence, the court must overrule an Evidence Code section 352 objection. (See *People v. Hart* (1999) 20 Cal.4th 546, 606.) "Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense." (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553.)

"Reasonable exercise of trial court discretion pursuant to Evidence Code section 352 requires that the trial judge balance the probative value of the offered evidence against its potential of prejudice, undue consumption of time, and confusion. [Citation.] That balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in [Evidence Code] section 352 for exclusion. [Citation.] The more substantial the probative value of the evidence, the greater the danger of the presence of one of the excluding factors that must be present to support an exercise of trial court discretion excluding the evidence. [Citation.]" (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.)

### 3. *Analysis*

Aguirre claims that by excluding the hate letter from evidence, the court erroneously prevented Aguirre from testing Benavides's credibility by showing proof of her bias against Aguirre. However, as already discussed, "the trial court has discretion to exclude impeachment evidence . . . if it is collateral, cumulative, confusing, or misleading." (*People v. Price* (1991) 1 Cal.4th 324, 412.)



Here, the hate letter was: (1) evidence of a collateral matter; (2) cumulative as to the matter it addressed; and (3) potentially confusing or misleading to the jury. "A collateral matter has been defined as 'one that has no relevancy to prove or disprove any issue in the action.' [Citation.]" (*People v. Rodriguez, supra*, 20 Cal.4th at p. 9.) Here, the issue in the action revolved around Aguirre's conduct toward the victim, to which the victim testified, and not on the relationship between Aguirre and Benavides. However, "[a] matter collateral to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue." (*Ibid.*)

Although collateral evidence on Benavides's credibility was relevant to the matter, a court may exclude it for being cumulative. Here, the court was justified in its finding that the hate letter was cumulative. The hate letter proved that Benavides and Aguirre had a tumultuous relationship and that Benavides once expressed her desire to be happy when he was suffering. The record reflects ample evidence concerning the relationship between Aguirre and Benavides. Both Aguirre and Benavides testified to the contents of the hate letter. Benavides testified that Aguirre was arrested for hitting her and that she was recently arrested for waving a knife at Aguirre. Finally, both testified that they often fought and had a few breaks in their relationship.

The hate letter had weak probative value because it was collateral to the issue in the action and unnecessary due to its cumulative nature. (See *People v. Foster* (1926) 79 Cal.App. 328, 334 [exclusion of cumulative evidence "worked no hardship on defendant"].) Thus, the prejudicial effect of its exclusion to Aguirre was small.

Under these circumstances, and in light of the broad discretion granted courts in evidentiary matters, we conclude that the court did not abuse its discretion in excluding the hate letter under Evidence Code section 352.

Moreover, even assuming that the trial court should have admitted the hate letter, Aguirre was not prejudiced. Aguirre's constitutional right to present a defense was not violated by the exclusion of evidence of marginal probative value. (See *People v. Brown* (2003) 31 Cal.4th 518, 545; *People v. Hall* (1986) 41 Cal.3d 826, 834 ["As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense"].)

We review evidentiary errors, which do not implicate constitutional dimensions, under the *Watson*<sup>5</sup> harmless error test. Under *Watson*, an error is prejudicial if, in light of the record, it is reasonably probable that the jury would have reached a result more favorable to a defendant had the court not erroneously excluded the evidence. (See *People v. Mullens* (2004) 119 Cal.App.4th 648, 669.)

Here, the record reflects Aguirre presented a defense based on his claim that he never committed the charged offenses. Aguirre testified and presented evidence that Benavides had a possible bias against Aguirre. It is therefore not reasonably probable that the admission of marginally probative evidence on a collateral matter would have swayed the jury to reach a result more favorable to Aguirre.

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<sup>5</sup> *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

*B. Misdemeanor Battery Is Not a Lesser Included Offense of Section 288*

Aguirre contends the court erred by not sua sponte instructing the jury that misdemeanor battery under section 242 was a lesser included offense to lewd and lascivious acts upon a child under the age of 14 under section 288 when there was substantial evidence that Aguirre was only guilty of misdemeanor battery. We reject this contention.

"[E]ven absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 118.) "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.)<sup>6</sup>

Courts have held that misdemeanor battery under section 242 is not a lesser included offense to lewd and lascivious acts upon a child under the age of 14 under section 288 and thus courts have no obligation to instruct *sua sponte*. (See *People v. Santos* (1990) 222 Cal.App.3d 723, 739.) We agree and conclude that under the elements test misdemeanor battery is not a lesser included offense of lewd and lascivious acts upon

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<sup>6</sup> Aguirre references the accusatory pleadings test as an alternative test to determine whether battery is a lesser included offense of section 288. However, this test is inapplicable here as it was developed to ensure "defendants receive notice before they can be convicted of an uncharged crime" (*People v. Reed, supra*, 38 Cal.4th at p. 1229), and thus it should only be used when the determinative question is "whether a defendant received notice, and therefore may be convicted, of an uncharged crime." (*Id.* at p. 1231, italics omitted.)

a child under the age of 14. Section 242 defines battery as "any willful and unlawful use of force or violence upon the person of another." Thus, "a battery cannot be accomplished without a touching of the victim." (*People v. Marshall* (1997) 15 Cal.4th 1, 38.)

However, a perpetrator need not touch the victim to violate section 288. (See *People v. Mickle* (1991) 54 Cal.3d 140, 175-176 [section 288 can be violated by perpetrator compelling child to remove her own clothing]; *People v. Meacham* (1984) 152 Cal.App.3d 142, 154 [perpetrator violated section 288 by instructing children to touch their own genitalia], overruled on another ground in *People v. Brown* (1994) 8 Cal.4th 746; *People v. Austin* (1980) 111 Cal.App.3d 110, 113-115 [perpetrator violated section 288 by compelling child to remove her own clothing].) Therefore, because section 288 can be violated without also necessarily committing the lesser crime of misdemeanor battery, it follows that the latter is not a lesser included offense of the former and the trial court has no sua sponte duty to so instruct.

DISPOSITION

The judgment is affirmed.

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NARES, J.

WE CONCUR:

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McCONNELL, P. J.

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McINTYRE, J.